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Public Law: State and Local Taxation

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cision in *Hamilton v. City of Shreveport*,⁴⁰ dismissed a tort claim against the parish and its traffic engineer because it found no legislative waiver of immunity on the part of the parish as is necessary in order to trigger the provisions of Article 3, Section 35, of the Louisiana Constitution. In *Warfield v. Fink & McDaniel Plumbing & Heating*,⁴¹ however, the Fourth Circuit found such a waiver in the statutes authorizing the New Orleans sewer and water board to exercise the expropriating power.⁴² Relying upon an early Supreme Court opinion,⁴³ the court first equated the power to expropriate with the power to sue or be sued, and then equated that with a waiver of the board's sovereign immunity. A similar result was reached, in line with the *Hamilton*⁴⁴ decision, in *Pierce v. Fidelity & Cas. Co.*,⁴⁵ where a pre-existing charter provision authorizing the parish of East Baton Rouge to sue or be sued was retroactively read and applied as a waiver of immunity in tort under Article 3, Section 35, of the Louisiana Constitution. Immunity was not found waived, however, by passage of two similar but not identical resolutions of the 1964 House and 1966 Senate of the Louisiana legislature, since the history of those resolutions was non-supportive of any "concurrent" characterizations.

STATE AND LOCAL TAXATION

*Michael R. Klein**

Interestingly, there was little jurisprudence during this symposium period concerned with ad valorem taxes or tax sales. Only one such opinion seems noteworthy. In *Jackson v. Hanna*,¹ the Second Circuit made an effort to clarify judicial characterization of the periods for redemption and annulment under Article 10, section 11 of the Louisiana Constitution. Put in the light of the developed jurisprudence, the opinion would characterize the three year period for redemption as a preemptive right and the six month or five year period for annulment as a prescriptive one albeit limitedly so, inasmuch as corporeal possession alone stops the running of time. While the opinion does not alter

40. 247 La. 784, 174 So. 2d 529 (1965).

41. 203 So.2d 827 (La. App. 4th Cir. 1967).

42. LA. R.S. 33:4078 (1950), as amended La. Acts 1952, No. 262, § 1; La. Acts 1956, No. 426, § 1.

43. *State v. Kohnke*, 109 La. 838, 33 So. 793 (1903).

44. *Hamilton v. City of Shreveport*, 247 La. 784, 174 So. 2d 529 (1965).

45. 205 So. 2d 831 (La. App. 1st Cir. 1967).

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1. 206 So. 2d 779 (La. App. 2d Cir. 1968).

the jurisprudence, its effort to clarify this hazy definitional problem makes it worthy of note.

Two opinions in the inheritance tax area merit consideration. In *St. Charles Land Trust v. St. Amant*,² the Fourth Circuit characterized the interest of a non-resident beneficiary of a Louisiana land trust as an intangible movable rather than as an immovable. By so doing, it places the beneficiary's interest beyond the reach of the Louisiana inheritance tax.³ This result was variously rationalized by the court, most significantly by placing heavy emphasis on the "higher" authoritative status of the trust code vis a vis the inheritance tax law.⁴ The opinion thus appears to presage considerable judicial deference to the thrust of the trust code in any future confrontations with the general law, including the tax law. A legacy to the decedent's company's "profit-sharing retirement trust" was held outside the exemption for charitable bequests in *Succession of Hyams*.⁵ The court based its interpretation of the state's inheritance tax provisions upon jurisprudence calling for strict construction of all exemptions as well as upon jurisprudence limiting the "charitable" exemption to those bequests to institutions which relieve the state of such burdens as it might reasonably be expected to assume on its own.

In *Romig v. Mouton*,⁶ the court was faced with the task of initially construing a 1946 amendment to the Louisiana income tax law relating to deductions from net income for taxes elsewhere paid.⁷ The income in question arose from the liquidation of a domestic corporation. The problem arose as a consequence of disparate tax treatment of such gains by the federal as compared to the Louisiana tax law. Under federal law, the proceeds from such liquidations are taxable income to the shareholders;⁸ in Louisiana the corporation itself pays the tax.⁹ At issue was whether the shareholders could deduct from their calculation of personal net income subject to the Louisiana tax the amount of federal taxes paid by the Louisiana corporation on the liquidation proceeds. In resolving the question the court felt called upon to test the state's general policy in favor of allowing deductions

2. 206 So. 2d 128 (La. App. 4th Cir. 1967).

3. LA. R.S. 47:2404 (1950).

4. On a theory that the former was specifically mandated by the Constitution, while the latter was a simple legislative enactment.

5. 199 So. 2d 29 (La. App. 4th Cir. 1967).

6. 205 So. 2d 752 (La. App. 1st Cir. 1967).

7. LA. R.S. 47:55(4) (1950).

8. 26 U.S.C. §337 (1964).

9. LA. R.S. 47:135(B) (1950).

for taxes elsewhere paid against the seemingly applicable statutory exclusions from that rule relating to "taxes paid on net income on which no Louisiana income tax has been paid, and on which, for any reason whatsoever, no Louisiana income tax will be paid . . ." The court resolved the issue in favor of the shareholders by construing income from the liquidation in the singular. That is to say, the statutory exclusion did not apply because Louisiana income tax had been paid on the income in question, albeit by the corporation rather than by the individual shareholders.

Two decisions during the symposium period dealt with problems of tax collection. Section 47:1572 of the Revised Statutes requires that "any person in possession of property or rights to property [which has been subjected to] distraint" for past due taxes must "surrender such property or rights to the collector or his authorized assistants" upon their demand in order to satisfy the state's claim for taxes. In *Collector of Revenue v. Tenneco Oil Co.*,¹⁰ the state sought to proceed under this collection device by attaching an obligation owed by a third party to the tax debtor by virtue of a judgment rendered by a federal district court in Florida. The third party (Tenneco) resisted the effort at seizure arguing, inter alia, that its obligation to pay its creditor, the absent tax debtor, was not a right subject to the jurisdiction of the Louisiana courts but rather a judgment debt with a fixed situs in Florida. Accepting this rationale, upon its reading of Supreme Court opinions in the area,¹¹ the court extricated Tenneco from any obligation to or involvement with the state over taxes owed by its creditor. The other decision relating to the judicial role in tax collections was *Acosta v. Board of Comm'rs of Lake Borgne Basin Levee Dist.*¹² At issue was the reach of the constitutional¹³ and statutory¹⁴ prohibitions on the "issuance of process to restrain the collection of any tax." The principal question posed was whether local or forced contribution was a tax, within the meaning of those prohibitions. Reviewing apparently conflicting jurisprudence on this definitional question, the court concluded that, whatever be the proper characterization for other purposes, the intent of this legislation, "to prevent the disruption of fiscal and governmental functions dur-

10. 206 So. 2d 302 (La. App. 4th Cir. 1968).

11. *Harris v. Balk*, 198 U.S. 215 (1905); *Chicago, R.I. & Pac. Ry. v. Sturm*, 174 U.S. 710 (1899).

12. 251 La. 789, 206 So. 2d 496 (1968).

13. LA. CONST. art 10, §18.

14. La. Acts 1938, No. 330.

ing the pendency of a taxpayers suit"¹⁵ required application of the prohibition in this instance.

PROCEDURE

CIVIL PROCEDURE

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Few of the year's three hundred procedural decisions possess the significance of *League Central Credit Union v. Montgomery*,¹ which resolved a conflict in our jurisprudence concerning sales under executory process. Nevertheless, clusters of cases indicate development or confusion as to given points of procedural law. This discussion will concentrate on these, for they must represent a much larger body of trial practice problems concluded without appeal. The lack of importance of many of the undiscussed decisions is again a tribute to the procedural reform accomplished by the Louisiana Code of Civil Procedure of 1960 and to the vision of the late Dean Henry George McMahon and the Code's other principal architects.

TWO FREQUENT MISTAKES OF PRACTITIONERS

On reading the procedural decisions of the past year, one is struck by two errors which account for the dismissal of over seven percent of these appeals (and of almost two percent of *all* appeals).

The first and most serious concerns a misunderstanding as to when a devolutive appeal bond must be filed. The bond must be filed within the delay required to perfect the appeal, ninety days after the judgment becomes final in the trial court.² That is, not only must the order of appeal be taken within the delay, but also the security to perfect it must be filed within this period. Despite this requirement of our law, in twelve instances

15. *Acosta v. Board of Comm'rs of Lake Borgne Basin Levee Dist.*, 251 La. 798, 206 So. 2d 499 (1968).

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1. 251 La. 971, 762 So. d 655 (1968). See discussion in text at note 163 *infra*.

2. L.A. CODE CIV. P. art. 2087. This provides that the order for appeal must be obtained and the appeal bond furnished within ninety days of the denial of an application for a new trial, or, if none, within ninety days of the expiration of the delay to apply for a new trial.